

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

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|-------------------------|---|---|
| STATE OF IDAHO,         | ) |   |
|                         | ) | <b>Docket Nos. 33353/33354</b>          |
| Plaintiff-Respondent,   | ) |   |
|                         | ) |   |
| v.                      | ) |   |
|                         | ) |   |
| KRISTOPHER S. COREY,    | ) |   |
|                         | ) |   |
| Defendant-Appellant.    | ) |   |
|                         | ) |   |
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| STATE OF IDAHO,         | ) |   |
|                         | ) | <b>Docket Nos. 34327/34328</b>          |
| Plaintiff-Appellant,    | ) |   |
|                         | ) | <b>2008 Unpublished Opinion No. 550</b> |
| v.                      | ) |   |
|                         | ) | <b>Filed: July 14, 2008</b>             |
| KRISTOPHER SHANE COREY, | ) |   |
|                         | ) | <b>Stephen W. Kenyon, Clerk</b>         |
| Defendant-Respondent.   | ) |   |
|                         | ) | <b>THIS IS AN UNPUBLISHED</b>           |
|                         | ) | <b>OPINION AND SHALL NOT</b>            |
|                         | ) | <b>BE CITED AS AUTHORITY</b>            |
| <hr/>                   | ) |   |

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. John T. Mitchell, District Judge.

Order revoking probation, affirmed. Order granting Rule 35 motion, reversed.

Molly J. Huskey, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for Kristopher S. Corey.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for the State of Idaho.

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LANSING, Judge

In this consolidated appeal, Kristopher S. Corey appeals from the district court's order revoking his probation and executing sentence in two cases. He contends that the district court erred in revoking his probations and in failing to *sua sponte* reduce his sentences upon revocation of probation. The State appeals from the district court's subsequent order granting

Corey's motion for Idaho Criminal Rule 35 relief on both sentences, which order again placed Corey on probation. We reverse the district court's order granting Rule 35 relief for lack of jurisdiction. In all other respects, the district court is affirmed.

## **I.**

### **FACTS AND PROCEDURE**

In 2001, Corey was charged with two counts of aggravated assault and one count of possession of methamphetamine. Pursuant to a plea agreement, Corey pleaded guilty to the possession charge and the aggravated assault charges were dismissed. Sentencing on the possession charge was deferred pursuant to Corey's agreement to participate in a drug court program. Two months later, Corey was terminated from the program. The district court imposed a unified term of imprisonment of three years, with one year fixed, and placed Corey on probation.

Two months later, a report of multiple probation violations was filed, including numerous positive urinalyses. The district court found Corey in violation but declined to execute the sentence, choosing instead to again place Corey on probation with additional terms. Less than two months later, another report of multiple probation violations was filed, including another positive urinalysis and consuming alcohol while out of the county jail on work release. The district court found Corey in violation and again continued probation. Nine months later, the court ordered additional jail time because of two additional positive urinalyses.

Eight months later, Corey was charged with possession of methamphetamine with intent to deliver. Pursuant to a plea agreement, he pleaded guilty to a reduced charge of possession of methamphetamine and was sentenced to a concurrent unified term of incarceration of seven years, with two years fixed. In the prior possession case, a report of multiple probation violations was filed, including commission of the new criminal offense, failing to report for urinalyses on nine occasions, absconding from supervision, and using marijuana and methamphetamine. The district court found Corey in violation of probation and executed the sentence. In both cases, the district court retained jurisdiction. After the period of retained jurisdiction, the district court again placed Corey on probation.

Six months later, Corey was arrested for driving without privileges, leaving the scene of an accident, and DUI. A report of multiple probation violations was filed, including the above offenses and use of methamphetamine. The district court found Corey in violation and again

continued probation. About fifteen months later, another report of probation violations was filed, including allegations that Corey had committed petit theft and unlawful entry and had been terminated from the county's mental health drug court program. The district court found Corey in violation and, on July 27, 2006, ordered the sentences executed. Corey filed timely notices of appeal in both cases.

One week after entry of the district court's order, Corey filed I.C.R. 35 motions for reduction of his sentences. The motions requested that no hearing be scheduled "at this time," and no new or additional information was filed with the motions. The motions languished until February of 2007, when a hearing was scheduled. In March, Corey filed materials in support of the motions. Ultimately, a hearing was held on May 14 and, on May 22, 2007, the district court entered an order granting Rule 35 relief in both cases, again placing Corey on probation. The State filed timely notices of appeal.

The four appeals have been consolidated for purposes of appellate review.

## **II.**

### **ANALYSIS**

#### **A. Corey's Appeals**

We first address the issues presented in Corey's appeals. Corey contends that the district court erred in revoking his probations and in failing to *sua sponte* reduce his sentences upon revocation of probation.

It is within the trial court's discretion to revoke probation if any of the terms and conditions of the probation have been violated. Idaho Code §§ 19-2603, 20-222; *State v. Beckett*, 122 Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992); *State v. Adams*, 115 Idaho 1053, 1054, 772 P.2d 260, 261 (Ct. App. 1989); *State v. Hass*, 114 Idaho 554, 558, 758 P.2d 713, 717 (Ct. App. 1988). In determining whether to revoke probation a court must examine whether the probation is (1) achieving the goal of rehabilitation and (2) consistent with the protection of society. *State v. Upton*, 127 Idaho 274, 275, 899 P.2d 984, 985 (Ct. App. 1995); *Beckett*, 122 Idaho at 325, 834 P.2d at 327; *Hass*, 114 Idaho at 558, 758 P.2d at 717. The court may, after a probation violation has been established, order that the suspended sentence be executed or, in the alternative, the court is authorized under Idaho Criminal Rule 35 to reduce the sentence. *Beckett*, 122 Idaho at 325, 834 P.2d at 327; *State v. Marks*, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct.

App. 1989). A decision to revoke probation will be disturbed on appeal only upon a showing that the trial court abused its discretion. *Beckett*, 122 Idaho at 325, 834 P.2d at 327.

Applying the foregoing standards, and having reviewed the record in this case, we cannot say that the district court abused its discretion either in revoking probation or in ordering execution of the sentences without modification. Corey's performance on probation was, at best, extremely poor. He violated terms of his probations innumerable times, including repeatedly using methamphetamine and committing additional criminal offenses. The district court was exceedingly lenient and gave Corey numerous chances to succeed on probation, but Corey was unable to do so. Corey has not shown that the district court erred by revoking his probations or by failing to reduce his sentences at the time of revocation. Therefore, the orders revoking probation and directing execution of Corey's previously suspended sentences are affirmed.

#### **B. The State's Appeals**

The State appeals from the district court's subsequent orders granting Corey's motion for I.C.R. 35 relief on both sentences, which order again placed Corey on probation nearly ten months after probation was revoked and the sentences were executed. The State first contends that the district court lacked jurisdiction to rule on the motion in the first instance. We are constrained to agree.

If a trial court fails to rule upon a Rule 35 motion within a reasonable time after the time limit within which to file the motion under the rule, the trial court loses jurisdiction. *State v. Chapman*, 121 Idaho 351, 354, 825 P.2d 74, 77 (1992). The Idaho Supreme Court explained that this requirement that the trial court act on a Rule 35 motion within a reasonable time is necessary to prevent the court from usurping the responsibilities of parole officials. *Id.* at 355, 825 P.2d at 78. *See also State v. Tranmer*, 135 Idaho 614, 617-18, 21 P.3d 936, 939-40 (Ct. App. 2001).

When a Rule 35 motion for reduction of sentence has been filed, the defendant's attorney carries the burden of precipitating action on the motion within a reasonable time or otherwise providing adequate justification for a delay. *State v. Bromgard*, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003); *State v. Day*, 131 Idaho 184, 186, 953 P.2d 624, 626 (Ct. App. 1998). Failure to do so creates the risk that the trial court will lose jurisdiction to consider the motion. *Id.* This Court has held that a significant period of delay is unreasonable, leading to a loss of jurisdiction, where the record is silent as to a viable basis for the delay. *See State v. Payan*, 132 Idaho 614, 619, 977 P.2d 228, 233 (Ct. App. 1998); *State v. Simpson*, 131 Idaho 196, 198, 953

P.2d 636, 638 (Ct. App. 1998); *Day*, 131 Idaho at 186, 953 P.2d at 626; *State v. Maggard*, 126 Idaho 477, 479, 886 P.2d 782, 784 (Ct. App. 1994).

Corey filed timely Rule 35 motions for reduction of the sentences on August 3, 2006. The motions did not request any particular relief, were not supported by additional information and specifically requested that no hearing be scheduled “at this time,” but did not explain why additional time was necessary. Instead, the motions simply explained that they were being filed at that time to preserve the defendant’s rights, given the limited fourteen-day time period to file an I.C.R. 35 motion for reduction of sentence after revocation of probation.

Nothing happened in either case until February 2, 2007, when the district court received an order from the Idaho Supreme Court suspending Corey’s direct appeals pending the district court’s rulings on the Rule 35 motion. On February 27, 2007, a hearing on the motions was scheduled for March 28, 2007. On March 5 Corey filed materials in support of his motion, consisting primarily of his medical records from the penitentiary. The initial hearing date fell through when witnesses were unavailable. Ultimately, a hearing was held on May 14 and, on May 22, 2007, the district court entered an order granting Rule 35 relief in both cases, which order again placed Corey on probation.

Under these facts, we are constrained to conclude that the district court lost jurisdiction to rule on the motions before the hearing was even scheduled. No explanation was proffered by defense counsel for the inactivity between the last day for the filing of the motion, August 9, 2007, and the initial scheduling of the hearing on the motions for February 27, 2007, a delay of over six and one-half months. Defense counsel bears the burden of precipitating action on a Rule 35 motion within a reasonable time or otherwise providing adequate justification for a delay. *Bromgard*, 139 Idaho at 380, 79 P.3d at 739. Here, defense counsel proffered no viable justification for the delay. We therefore hold that the period of the delay was unreasonable and caused the district court to lose jurisdiction to rule on the motions. The district court’s orders granting Rule 35 relief are, accordingly, reversed.<sup>1</sup>

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<sup>1</sup> There are many things that a trial court may do to ensure that it does not lose jurisdiction over I.C.R. 35 motions, including *sua sponte* setting a timely hearing and entry of a corresponding order requiring the submission of the required additional materials in support by a date certain.

The State has also argued that the district court usurped the authority of the executive branch by granting the Rule 35 motions. In *Chapman* the Supreme Court said that the requirement that the trial court act on a Rule 35 motion within a reasonable time is necessary to prevent the court from usurping the responsibilities of parole officials. *Chapman*, 121 Idaho at 355, 825 P.2d at 78. See also *Tranmer*, 135 Idaho at 617-18, 21 P.3d at 939-40. Here, the district court granted Rule 35 relief primarily on the grounds that the Department of Correction had failed to follow the court's recommendations concerning the medication to be prescribed to Corey while incarcerated and concerning the rehabilitative programming the district court thought was necessary. The State argues that the district court impermissibly second-guessed decisions within the exclusive purview of the Department of Correction and that this equates to judicial usurpation of the authority of the executive branch on these subjects. Given our disposition of this appeal, we need not decide that issue at this time.

### **III.**

#### **CONCLUSION**

We reverse the district court's order granting Rule 35 relief for lack of jurisdiction. In all other respects, the district court is affirmed. This matter is remanded to the district court for proceedings consistent with this opinion.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**